In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

THE PUYALLUP TRIBE, PETITIONER

v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Solicitor General, on behalf of the Puyallup Tribe, petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 80 Wash. 2d 561, 497 P.2d 171, and is reprinted in the appendix to the petition for a writ of certiorari in *Department of Game of the State of Washington* v. *The Puyallup Tribe,* No. 72–481. That court's previous opinion in this case is reported at 70 Wash. 2d 245, 422 P.2d 754; and this Court's opinion upon review of that decision is reported at 391 U.S. 392. The findings and conclusions of the Superior Court for Pierce County, Washington (App., *infra,* pp. 10–16) are unreported.

488-934—72

JURISDICTION

The judgment of the Supreme Court of Washington was entered on May 4, 1972. Timely petitions for rehearing were denied by that court on June 23, 1972. On September 20, 1972, Mr. Justice Douglas extended the Tribe's time for filing a petition for a writ of certiorari to November 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a state conservation regulation absolutely prohibiting the Puyallup Indians from net fishing for steelhead trout at their usual and accustomed places, rather than limiting sport fishing so as to preserve some measure of the Indians' net fishery, violates the Treaty of Medicine Creek as interpreted in the prior decision of this Court in this case.

STATUTES AND TREATY PROVISIONS INVOLVED

The Treaty of Medicine Creek, 10 Stat. 1132, Article III, provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, * * *.

Revised Code of Washington 77.16.060 provides:

> It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tie-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any of the waters of this state with intent thereby to catch, take

or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*: That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

4 Washington Administrative Code 232–12–340 provides:

WAC 232–12–340 MAXIMUM NUMBER OF FISHING LINES AND HOOKS—SNAGGING AND GAFFING FISH UNLAWFUL. It shall be unlawful for any person to snag, spear, trap, shoot, or attempt to snag, spear, trap or shoot any game fish. No person shall fish for game fish in any other manner than with one line or rod held in the hand, and that such line or rod shall be under his immediate and absolute control. For the purpose of this regulation a hook means one single, double or treble fish hook. Any fishing line may have attached thereto any number of flashers or blades but no more than two hooks, flies or artificial lures, or a combination of same. Artificial lures may have attached thereto any number of hooks. PROVIDED, That fresh water ling cod may be taken from Lake Palmer in Okano-

gan County, Lake Kachess, Keechelus and Cle Ellum in Kittitas County with no more than one set line having attached thereto any number of hooks. Any set line must have attached an indestructible tag with the true name and address of the owner in legible English.

STATEMENT

This case concerns the validity of the application to the Puyallup Tribe of Indians of regulations of the State of Washington prohibiting net fishing for steelhead trout. The case was previously before this Court in 1968, at which time this Court affirmed the judgment of the court below remanding the case to the trial court for further findings of fact. 391 U.S. 392. Essentially, the issues to be decided on remand were whether the Washington regulations prohibiting the taking of steelhead trout by net were reasonably required in the interest of conservation, gave adequate consideration to the rights granted the Tribe by treaty, and did not discriminate against the Indians. On remand, the trial court, after a hearing, dissolved the injunction prohibiting Puyallup Indians from taking fish by net. It held that adequate criminal sanctions were available to prevent such fishing and that in any criminal case the State would have the burden of proving that the regulations in effect at that time were reasonable and necessary for the conservation of fish.

Both plaintiffs and defendants appealed to the Supreme Court of the State of Washington. That court held that the regulations prohibiting fishing by net for

steelhead trout for the year 1970 were valid, that new fishing regulations for the Puyallup Tribe must be made each year supported by facts and data that show the regulation is necessary for the conservation of the species of fish in question, and that the injunction against the Tribe should be reinstated subject to modifications consistent with the opinion of the court. The court upheld the 1970 prohibition of net fishing for steelhead trout on the ground, inter alia, that "the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river." 80 Wash. 2d. at 573. Petitions for rehearing timely filed by the Department of Game of the State of Washington and by the Puyallup Tribe were denied. The Department of Game has filed a petition for a writ of certiorari (No. 72-481), and Ramona C. Bennett has filed a conditional cross-petition (No. 72-5437).

REASONS FOR GRANTING THE WRIT

The decision below, in our view, fails to adhere to the guidelines previously set forth by this Court in this case, in that the approved regulatory scheme involves discrimination against the Puyallup Tribe's treaty rights which is not necessary for the conservation of fish. This Court held that the Tribe's treaty right to take fish at their accustomed places may be regulated for the conservation of fish "provided the regulation meets appropriate standards and does not discriminate against the Indians," although "any ultimate findings on the conservation issue must also cover the

issue of equal protection implicit in the phrase 'in common with' " (391 U.S. at 398, 403).

In upholding, as applied to the Puyallup Tribe in 1970, the State's classification of the steelhead as a game fish, R.C.W. 77.08.020, and its prohibition of taking game fish by nets, R.C.W. 77.16.060, the court below reasoned (80 Wash. 2d 561, 573):

> [T]he catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river.

The decision thus permits net fishery by the Tribe only if there are enough fish left *after* sportsmen have taken the catch permitted them by the State. In so holding, the court rejected the Tribe's contention (Br. p. 12) that sport fishing should be sufficiently limited to avoid total or unwarranted preemption of the traditional Indian fisheries protected by the treaty of Medicine Creek. Thus, although the opinion below directs the Department of Game to review annually the possibility of a netting season for the Tribe, it also clearly permits the State to reserve steelhead trout exclusively for sport fishing and, in light of the State's past deference to game fishermen, there is little prospect that Indian net fishing would ever be allowed.

Since this Court's previous decision in the present case, two thoughtful decisions of lower courts have developed standards for accommodating the interests of the States and sportsmen in sport fishing with the interests of Indians in their traditional fishing. *Sohappy* v. *Smith*, 302 F. Supp. 899, 909–910 (D. Ore.); *State* v. *Tinno*, 94 Idaho 759, 497 P. 2d 1386, 1393. These decisions, we submit, rather than the decision below, properly apply the principles set forth by this Court. In both cases the courts recognized that when Indians entered into treaties for taking fish they were concerned not with sport fishing, but with taking fish for consumption and trade. These decisions further recognize that state regulation of Indian fishing rights must distinguish between the States' legitimate interest in conservation of fish and improper allocation of fish to one group in abrogation of the federally protected treaty rights of another.[1]

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[1] The present case differs from *Moses* v. *State of Washington*, No. 71-5423, certiorari denied, 406 U.S. 910, in two important respects. Here, in contrast to the Tribe involved in *Moses*, there is no doubt that the Puyallup Tribe was a party to the treaty of Medicine Creek and has the treaty rights it asserts. And here, rather than finding that conservation needs require prohibition of all net fishing in the Puyallup River, the Supreme Court of Washington has specifically authorized such fishing but only if there are sufficient fish left after sport fishermen have taken their catch without any limitation based on Indian treaty rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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NOVEMBER 1972.

APPENDIX

In the Superior Court of the State of Washington for Pierce County

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, AND THE DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON, PLAINTIFFS

vs.

THE PUYALLUP TRIBE, INC., A FEDERAL ORGANIZATION, ET AL., DEFENDANTS

Decree

This matter having come on regularly for trial before the undersigned judge of the above-entitled court pursuant to a supplemental petition of plaintiffs seeking an amended injunction, and upon the remand of the Supreme Court of the State of Washington after prior proceedings in this court and the state supreme court's decision in 70 Wn. 2d 245, 422 P.2d 754 (1967), and the U.S. Supreme Court's decision in 391 U.S. 392, 88 Sup. Ct. 1725, 20 L.Ed. 2d 689; and the plaintiffs having been represented by the Honorable Slade Gorton, attorney general of the state of Washington, through Mr. Joseph L. Coniff, his assistant for the Department of Game, and Mr. William N. Gingery, his assistant for the Department of Fisheries; and the defendants being represented by the Honorable Stan Pitkin, U.S. attorney for the Western District of Washington, through Mr. Jerald E. Olson, his assistant, appearing for the defendant Puyallup Tribe; Mr.

Jack E. Tanner appearing for the defendant Silas Cross; Mr. Arnold J. Barer appearing for the defendants Satiacum and Siddle; Mr. Frank Wright appearing pro se; and Mr. John Sennhauser appearing for the defendant Ramona Bennett; and the court having entered its findings of fact and conclusions of law, and being fully apprised in the premises; now does, therefore,

Order, adjudge, and decree as follows:

1. The findings of fact and conclusions of law entered in this cause upon this date are incorporated herein by this reference as though fully set forth, and are declared to govern the rights, status, and other legal relationships between the parties hereto pursuant to RCW 7.24.010.

2. The temporary injunction heretofore entered by this court against the defendants is hereby dissolved.

Done in open court this 30th day of December, 1970.

BARTLETT RUMMEL,
Judge.

In the Superior Court of the State of Washington for Pierce County

No. 158069

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, AND THE DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON, PLAINTIFFS

vs.

THE PUYALLUP TRIBE, INC., A FEDERAL ORGANIZATION, ET AL., DEFENDANTS

Findings of Fact and Conclusions of Law

This matter having come on regularly for trial before the undersigned judge of the above-entitled court pursuant to a supplemental petition of plaintiffs seek-

ing an amended injunction, and upon the remand of the Supreme Court of the State of Washington after prior proceedings in this court and the state supreme court's decision in 70 Wn. 2d 245, 422 P. 2d 754 (1967), and the U.S. Supreme Court's decision in 391 U.S. 392, 88 Sup. Ct. 1725, 20 L. Ed. 2d 689; and the plaintiffs having been represented by the Honorable Slade Gorton, attorney general of the State of Washington through Mr. Joseph L. Coniff, his assistant for the Department of Game, and Mr. William N. Gingery, his assistant for the Department of Fisheries; and the defendants being represented by the Honorable Stan Pitkin, U.S. Attorney for the Western District of Washington, through Mr. Jerald E. Olson, his assistant, appearing for the defendant Puyallup Tribe; Mr. Jack E. Tanner appearing for the defendant Silas Cross; Mr. Arnold J. Barer appearing for the defendants Satiacum and Siddle; and Mr. John Sennhauser appearing for the defendant Ramona Bennett; and the court having reviewed the files and records herein insofar as material to the instant proceedings, and having heard extensive evidence, reviewed briefs and argument of counsel, and entered a memorandum decision herein, now enters the follow [sic]:

FINDINGS OF FACT

I

The Department of Fisheries has adopted a regulation admitted into evidence as exhibit #3 hereto, effective September 12, 1970, providing that it would be lawful for members of the Puyallup Tribe to take fish for, and possess salmon taken for commercial purposes, with gillnet and set nets in that portion of the Puyallup River lying between the city of Puyallup and the 11th Street Bridge in Tacoma, during the

period September 21 through October 23, 1970. This regulation is subject to the conditions that it would be unlawful to engage in this fishery during weekly closures from 6:00 p.m. Wednesday to 6:00 p.m. Sunday; that no set net could be used which extended more than one-third the width of the river, and that it would be unlawful to engage in this fishery with gillnet gear containing mesh larger than 6½ inches stretch measure.

II

The Department of Fisheries has determined that the Puyallup River system has a potential as a salmon producer considerably above present levels and is engaged in efforts to expand the runs in this river.

III

The Department of Fisheries has promulgated regulations recognizing special off-reservation treaty Indian fishing rights. In addition, it has declared as its policy the commitment of additional resources toward building up runs in the Puyallup River.

IV

For conservation reasons the Department of Fisheries limited the geographical scope of this fishery to that area of the river above the milling grounds at the mouth of the river and in Commencement Bay, and yet below the spawning grounds of the Puyallup River and its tributaries. The Department also limited the time and manner of fishing to permit escapement of salmon to the spawning areas to insure perpetuation of the species.

V

The Department of Fisheries extended the closure of the East Pass area to commercial fishing to protect the Fall 1970 run of spawning coho salmon to the Puyallup treaty Indian fishery. The Department did not place additional closures on fishing in Northern Puget Sound or the Strait of Juan de Fuca. Such additional closures could not be made specific to the Puyallup salmon in those areas because the stocks were still thoroughly mixed with feeding fish and the spawning salmon are destined for many other rivers and streams.

VI

A biologist from the Fisheries Department testified in the proceeding before this court that during the year 1970 there is a large run of coho and the period designated in the regulation for this opening to Indian net fishery was geared to permit fishing only on this coho run.

VII

The Department of Fisheries did not set a 1970 season for a chinook salmon net fishery in the Puyallup River because it felt that this run could not yet stand such a fishery.

VIII

After a review of all the facts, the action by the Department of Fisheries in passing the regulation is not unreasonable as far as the Indians are concerned.

IX

The Department of Fisheries has failed in its proof in showing a factual basis for the necessity of an in-

junction. There has been no proof that the Indians have violated the regulation referred to in Finding I hereof, nor is there any proof that it is necessary that Indians be enjoined from violating that regulation.

X

With respect to the Department of Game, the evidence shows that the Puyallup River normally would produce about 5,000 steelhead trout per year. By hatchery plants, the department has increased the annual take for licensed sport fishermen to 12,000 to 18,000 steelhead a year.

XI

The Department of Game in regulating game fish resources has not taken into consideration the treaty rights of the Indians as decreed by the Supreme Court. The Department of Game has not adopted a regulation recognizing the treaty rights of the Indians and hence its law and regulations are not shown to be reasonable and necessary.

From these findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I

Members of the Puyallup Tribe have fishing rights, secured by the Treaty of Medicine Creek.

II

The Department of Game and the Department of Fisheries have the exclusive power to make necessary and reasonable regulations for the conservation of the fish.

III

The burden of proof that an Indian is a member of the Puyallup Tribe is upon the Indian.

IV

The burden of proof to establish that the regulations restricting treaty Indian off-reservation fishing are reasonable and necessary for the conservation of the fish resources is upon the departments.

V

The Department of Fisheries has met the burden of proof that its regulation admitted into evidence herein is reasonable and necessary for the preservation of the fish resource.

VI

The Department of Fisheries can show no irreparable injury, and is adequately protected by criminal sanctions. The granting of an injunction would deprive the defendants of their right of jury trial with respect to any alleged violation of statute or regulation.

VII

The Department of Fisheries is not entitled to an injunction.

VIII

The Department of Game has failed to show that it is entitled to any injunctive relief for the same reasons as applied to the Department of Fisheries, and in addition because it has failed to give any consideration to Indian treaty fishing rights as decreed by the Supreme Court.

IX

Before the Department of Game may restrict members of the Puyallup Indian Tribe from fishing at off-reservation usual and accustomed fishing places of that Tribe, it must adopt regulations that conform

to the requirements heretofore prescribed by the Supreme Court in this case.

X

The temporary injunction issued herein upon the supplemental petition of the plaintiffs should be dissolved.

Done in open court this 30th day of December, 1970.

BARTLETT RUMMEL,
Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1972